Supreme Court, U. S.
FILED
MAR 15 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1264

THOMAS EARL HENDERSON, JR., *et al.*,
Petitioner

vs.

FORT WORTH INDEPENDENT SCHOOL DISTRICT, *et al.*, *Respondent*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Brief in Opposition to Certiorari

DAVID B. OWEN
CECIL A. MORGAN
2108 Continental Life Budg.
Fort Worth, Texas 76102
Attorneys for Respondent

March 12, 1979

Fort Worth Brief Printing Co., 610 S. Jennings Street Phone ED 2-4070

INDEX

Page

Table of Authorities ii

Opinions Below 1

Jurisdiction 2

Question Presented 2

Statutory Provision Involved 2

Statement of the Case 3

Reasons for Denying the Writ:

I. This Court should not review a matter which by Act of Congress was committed to the discretion of the district court. 7

II. The district court applied the correct standard for the exercise of the discretion vested in it by the Congress. 9

III. The district court was correct in concluding that the special and unique circumstances of this case would make an award of attorney's fees against the school district unjust. 10

IV. This Court should not exercise its supervisory power over the lower courts on an issue committed to district court discretion. 14

Conclusion 15

TABLE OF AUTHORITIES

Cases: Pages

Adams v. Reed, 567 F.2d 1283 (5th Cir. 1978) 8

Blassman v. Markworth, 359 F.Supp. 1 (N.D. Ill. 1973) 3

Bullock v. Carter, 405 U.S. 134, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972) 3

Chastang v. Flynn & Emrich Co., 541 F.2d 1040 (4th Cir. 1976) 8, 12

Chimento v. Stark, 353 F.Supp. 1211 (D. N.H. 1973) 3

Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978) 8

Henderson v. Fort Worth Independent School District:

(Henderson I-Merits)
526 F.2d 286 (5th Cir. 1976) 4

(Henderson II-Attorney's Fees)
574 F.2d 1210 (5th Cir. 1978) 5, 6, 9

(Henderson III-*en banc*)
584 F.2d 115 (5th Cir. 1978) 6

Hutto v. Finney, 57 L.Ed.2d 522 (1978) 8

Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974) 8

Kimbrough v. Arkansas Activities Ass'n, 574 F.2d 423 (8th Cir. 1978) 8

Manson v. Edwards, 482 F.2d 1076 (6th Cir. 1973) 3

Morrow v. Dillard, 580 F.2d 1284 (5th Cir. 1978) 7

Naprstek v. City of Norwich, 433 F.Supp. 1369 (N.D. N.Y. 1977) 8

Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968) 9, 12

Rainey v. Jackson State College, 551 F.2d 672 (5th Cir. 1977) 8

Sanford v. R. L. Coleman Realty Co., 573 F.2d 173 (4th Cir. 1978) 8

TABLE OF AUTHORITIES (Continued)

Cases: Pages

Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971) 9

Tillman v. Wheaton-Haven Recreation Ass'n, 517 F.2d 1141 (4th Cir. 1975) 14

Turner v. Fouche, 396 U.S. 346, 90 S.Ct. 532, 24 L.Ed.2d 567 (1970) 7, 11

Miscellaneous:

122 Cong. Rec. S1705, (daily ed. Sept. 29, 1976) (remarks of Sen. Kennedy) 13

122 Cong. Rec. H12163, (daily ed. Oct. 1, 1976) (remarks of Rep. Fish) 13

S.Rep.No. 94-1011, 94th Cong. 2d Sess. 5, reprinted in [1976] U.S. Code Cong. & Admin. News, pp. 5908, 5912 9

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1264

THOMAS EARL HENDERSON, JR., *et al.*,
Petitioner

vs.

FORT WORTH INDEPENDENT SCHOOL DISTRICT, *et al.*, *Respondent*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

Brief in Opposition to Certiorari

The respondent Fort Worth Independent School District respectfully prays that the writ of certiorari be denied.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit *en banc*, filed November 17, 1978, is reported at 584 F.2d 115 (5th Cir. 1978), and is reprinted in the Appendix to the Petition at Pages A-21 through A-22, and will be referred to herein as Henderson III.

The panel opinion of the United States Court of Appeals for the Fifth Circuit, filed June 12, 1978, is

reported at 574 F.2d 1210 (5th Cir. 1978), and is reprinted in the Supplemental Appendix C to the Petition at Pages C-1 through C-15, and will be referred to herein as Henderson II.

The opinion of the District Court, filed on July 15, 1977, on the issue of attorney's fees, is unreported, and is reprinted in the Appendix to the Petition at Pages B-23 through B-31.

The opinion of the Court of Appeals on the merits, filed on January 22, 1976, is reported at 526 F.2d 286 (5th Cir. 1976), and will be referred to herein as Henderson I.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

Whether the district court abused the discretion conferred upon it by the Congress in the Civil Rights Attorney's Fee Award Act of 1976 (42 U.S.C. §1988), by finding that under the unique and special circumstances of this case an award of attorney's fees would be unjust, and, therefore, denying such award.

STATUTORY PROVISION INVOLVED

United States Code, Title 42:§1988

In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this Title, and Title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a

violation of, a provision of the United States Internal Revenue Code, or Title VI of the Civil Rights Act of 1964, The Court, in its discretion, may allow the prevailing party, other than the United States, reasonable attorney's fees as part of the costs.

STATEMENT OF THE CASE

In 1925, the Fort Worth Independent School District was created by Act of the Texas Legislature. The Act required, among other things, that a candidate for the school board be a qualified voter in the school district for a period of three years.

In 1974, nearly 50 years later, petitioner Earl Henderson, then 18 years of age, filed application to become a candidate for the school board. Believing themselves bound by the state statute, the school authorities denied Henderson's application because he did not meet the 3-year qualified voter requirement.

On February 28, 1974, Henderson filed this suit, seeking an injunction to require that his name be placed on the ballot. After denials of preliminary relief by both the district court and the Court of Appeals, the district court, on May 12, 1975, entered an order upholding the validity of the 3-year qualified voter requirement and denying any relief to the plaintiff. The district judge, relying upon such authorities as *Bullock v. Carter*, 405 U.S. 134, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972), and others[1] was of the opinion that the "rational basis" test should be applied and that the questioned provision was constitutional. The case was submitted to the district court on stipula-

[1] e.g., *Manson v. Edwards*, 482 F.2d 1076 (6th Cir. 1973); *Blassman v. Markworth*, 359 F.Supp. 1 (N.D. Ill. 1973); *Chimento v. Stark*, 353 F.Supp. 1211 (D. N.H. 1973).

tions of fact and briefs, without the necessity of an evidentiary hearing.

On appeal to the Fifth Circuit, the Circuit's panel (Henderson I)[2] disagreed with the trial court, applied a "strict scrutiny" test, and held that the Texas Legislature exceeded its authority in requiring that a candidate for the school board be a qualified voter for three years. The decision of the Court of Appeals was rendered on January 22, 1976 — nine months prior to enactment on October 19, 1976, of the Civil Rights Attorney's Fee Award Act (42 U.S.C. §1988).

The school district did not move for rehearing or file a petition for a writ of certiorari. On the contrary, the school district immediately ceased to enforce the 3-year qualified voter requirement and honored petitioner's application to become a candidate in the 1976 school board election, held just 72 days after the decision of the Court of Appeals, and six months before passage of §1988.

It was over a year after the decision of the Fifth Circuit that the district court, on February 14, 1977, formally entered its order complying with the mandate. The entry of such order was, of course, a pure formality under the circumstances. Nine days later, petitioner filed his motion asking for an award of attorney's fees under §1988. While a prayer for attorney's fees had been included in the original complaint, such issue having been severed, nothing had been done by petitioner to obtain a ruling from the court, and this was the first time that entitlement to fees was asserted under §1988.

After an evidentiary hearing, the district court held

[2]526 F.2d 286 (5th Cir. 1976).

that "technically 42 U.S.C. 1988 is applicable." (Appendix B, p. 24) Noting that an award of attorney fees is, by the precise wording of the statute, discretionary with the court (Appendix B, p. 26), the trial judge said:

> "In the discretionary judgment of this Court it would be inappropriate to award attorney's fees under the facts presented in this case, ..." (Appendix B, p. 26-27)

The district court considered that there are unique and special circumstances in this case that render the award of a fee not to be "just, equitable, or in good conscience." (Appendix B, p. 30) In particular, the court discussed: (1) the fact that if it had not been for the court's delay in acting on a procedural formality, the case would have been disposed of long before §1988 was enacted; (2) the fact that the school district's enforcement of the questioned provision was mandated by legislative enactment, with which the school district had a duty to comply until the statute was changed or until instructed by a court to do otherwise; (3) the fact that this case was not a class action; (4) the relative unimportance of the case in terms of social significance; and (5) the complete and unchallenged good faith of the school district. In this last connection, the court made clear that no bad faith standard is required by §1988, and that the court's comment on that point was for "clarity and perspective." (Appendix B, p. 28)

On appeal to the Fifth Circuit, the Circuit's panel (Henderson II)[3] held that the record factually sup-

[3]574 F.2d 1210 (5th Cir. 1978).

ports the district court's finding of special circumstances that would render the award of attorney's fees unjust in this case. Under the abuse of discretion standard of revue, Henderson II found no abuse of discretion by the district court.

Henderson II also called attention to the fact that in enacting §1988, Congress' "overriding concern was to encourage individuals, particularly members of racial minorities, to seek relief from invidious discrimination based on race, sex, religion, wealth, and other inherently offensive criteria" (Appendix C, p. 5), and that such concern did not apply to the facts of this case. The Henderson II panel also noted that the asserted constitutional infirmity of the Texas statute "was virtually impossible for defendants to ascertain and correct, short of litigation or a change in legislation" (Appendix C, p. 12); that petitioner made no attempt to effect legislative change (Appendix C, p. 12); that this was not a class action (Appendix C, p. 12); and that the financial burden of a fee award would fall on people who participated in no discriminatory act, viz, the taxpayers of the school district (Appendix C, p. 7).

The Court of Appeals granted a petition for rehearing *en banc* and reached an even division (Henderson III)[4] resulting in an affirmance of the district court by operation of law. The Henderson III opinion does not set forth the views of the various judges.

The petitioner is in error at pages 3, 7, and 15 of the Petition in claiming that he was successful in "striking down" a further provision of the 1925 Texas statute which required that school board candidates

[4]584 F.2d 115 (5th Cir. 1978).

must also be freeholders in the district for one year. The school district has never sought to enforce the freeholder requirement since this Court's decision in *Turner v. Fouche*, 396 U.S. 346, 90 S.Ct. 532, 24 L.Ed. 2d 567 (1970). The record will show that the parties stipulated that, "The defendants agree that the first requirement [the freeholder requirement] is constitutionally infirm and they do not undertake to enforce it." That issue was never in this case. The validity of the 3-year qualified voter requirement was the only issue on the merits.

REASONS FOR DENYING THE WRIT

I.

This Court should not review a matter which by Act of Congress was committed to the discretion of the district court.

Congress specifically made the award of attorney's fees a matter for the exercise of discretion by the district court under the circumstances of each case. The Civil Rights Attorney's Fee Award Act of 1976 (42 U.S.C. §1988) says in pertinent part:

> ". . . the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee . . . ."

The principle of trial court discretion has often been recognized by the courts in cases involving §1988 and identical provisions in other statutes. In *Morrow v. Dillard*, 580 F.2d 1284, 1300 (5th Cir. 1978), the Fifth Circuit said:

> "The language of the Act itself unequivocally and expressly makes the award of fees a ques-

> tion of discretion for the court. Its judgment should be reversed only for an abuse of discretion." *Sandford v. R. L. Coleman Realty Co.*, 573 F.2d 173, 179 (4th Cir. 1978).

In *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 98 S.Ct. 694, 54 L.Ed.2d 648, 653 (1978), a Title VII case involving language identical to that of §1988, this court referred to the principle of:

> ". . . entrusting the effectuation of the statutory policy to the discretion of the district courts."

Mr. Justice Rehnquist, specifically referring to §1988 in his dissenting opinion in *Hutto v. Finney*, 57 L.Ed 2d 522, 551, footnote 4 (1978), said:

> "But that statute leaves the decision to award fees to the discretion of the district court, which may be expected to alleviate any possible unfairness."

To the same effect is *Adams v. Reed*, 567 F.2d 1283, 1287 (5th Cir. 1978), where the court said:

> "The discretion to determine the propriety of awards is committed to the trial judge." *Johnson v. Georgia Highway Express, Inc.*, 5 Cir., 1974, 488 F.2d 714, 717.

See also *Kimbrough v. Arkansas Activities Ass'n*, 574 F.2d 423, 427 (8th Cir. 1978); *Rainey v. Jackson State College*, 551 F.2d 672, 676 footnote 6 (5th Cir. 1977); *Chastang v. Flynn & Emrich Co.*, 541 F.2d 1040, 1045 (4th Cir. 1976); *Naprstek v. City of Norwich*, 433 F.Supp. 1369 (N.D. N.Y. 1977). Cf., this Court's reliance upon ". . . the informed judgment of

the district courts . . . ." *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed. 2d 554, 574 (1971).

Petitioner would have this Court place a construction on §1988 that would eliminate the word "discretion" from the statute. He argues for a mechanistic award of fees in any civil rights case without consideration of circumstances which would make a fee award unjust in a given case.

Review of a matter committed to the exercise of discretion by the district court does not authorize reversal merely because some might have reached a different conclusion. We respectfully submit that this Court should not substitute its judgment of the justice or injustice of a fee award in this case for that of the district court.

II.

The district court applied the correct standard for the exercise of the discretion vested in it by the Congress.

Both the district court and the Fifth Circuit panel in Henderson II found that the facts of this case present special circumstances which would render the award of attorney's fees unjust. Such findings are clearly a correct application of the standard for the exercise of judicial discretion which Congress intended under §1988, viz, that a prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." S.Rep.No.94-1011, 94th Cong. 2d Sess. 5, reprinted in [1976] U.S. Code Cong. & Admin. News, pp. 5908, 5912, quoting *Newman v. Piggie Park En-*

terprises, Inc., 390 U.S. 400, 402, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968).

Thus, there is no issue here whether the lower courts followed an improper standard. The discretion conferred by §1988, having been exercised under the correct standard, should not be set aside.

III.

The district court was correct in concluding that the special and unique circumstances of this case would make an award of attorney's fees against the school district unjust.

Even if this Court were to hold that it, rather than the district court, should pass on whether the circumstances of this case would make a fee award against the school district unjust, we respectfully submit that the district court reached the correct result.

Delay of the District Court

Although the school district pursued no appeal and immediately ceased enforcement of the questioned provision upon the January 22, 1976, decision of the Court of Appeals, there was a delay of over a year before the district court carried out the procedural formality of entering a final judgment pursuant to the mandate. If such formality had been carried out with ordinary promptness, this case would not have been pending, even technically, when §1988 was enacted in October, 1976.

It would be unjust to award fees under a statute that was not enacted until nine months after the case was decided and enforcement of the unconstitutional provision had ceased. An award under such circumstances would be to exalt form and completely ignore substance. It would penalize the school district for an act not of its doing or under its control. It would give petitioner an undeserved windfall. It would not serve the Congressional policy of encouraging private litigation to enforce important constitutional rights.

The State Statute

The school district's enforcement of the 3-year qualified voter requirement was not voluntary, but mandated by a 50-year old statute that had never before been questioned. The school district had no power to alter the statute. Petitioner made no effort to change the law through legislative processes. The school district was duty-bound to follow the state law until it was changed or a court instructed otherwise.

Furthermore, the asserted constitutional infirmity of the 3-year qualified voter provision was virtually impossible for the school district, unilaterally, to ascertain and correct. In marked contrast, the unconstitutionality of the freeholder provision of the same statute was clear, under *Turner v. Fouche*, 396 U.S. 346, 90 S.Ct. 532, 24 L.Ed.2d 567 (1970). The school district did not enforce or defend the freeholder provision. The 3-year qualified voter provision was an apparently valid exercise of the state legislature's power to prescribe minimal candidate qualifications. The district court so held. In all reason the issue seemed to favor upholding the validity of the provision until the Court of Appeals applied the "strict scrutiny" test and held it invalid. It would be dangerous and unrealistic to require school boards to attain constitutional clairvoyance on such doubtful issues,

and in doing so to ignore their sworn and constitutional duty to follow the laws of the state.

Furthermore, when the Court of Appeals declared the questioned provision unconstitutional, the school district ceased to comply with it immediately, pursued no appeal, and placed petitioner's name on the ballot for the school board election just 72 days later. Just as the Fourth Circuit said in affirming the denial of a fee award in *Chastang v. Flynn & Emrich Co.*, 541 F.2d 1040, 1045 (4th Cir. 1976):

> "We cannot say that it [the defendant] failed to act with reasonable dispatch as soon as a murky area of the law was clarified."

The fact that the defendant in *Chastang* did not have an unrestricted right to alter the situation was held to be a special circumstance that would render the award of an attorney fee unjust.

Social Significance

As the district court put it, "the judgment rendered for plaintiff is not of sufficient social significance to justify an award of attorney's fees under 42 U.S.C. 1988." (Appendix B, p. 27) The private attorney general rationale announced in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 88 S.Ct. 964, 19 L.Ed. 2d 1263 (1968), came from this Court's awareness that:

> "When the Civil Rights Act of 1964 was passed it was evident that enforcement would prove difficult and that the nation would have to rely in part upon private litigation as a means of securing broad compliance with the law." (19 L.Ed.2d at 1265)

The national importance of the rights vindicated in *Newman*, and the inherently difficult enforcement problems that spawned the rule to encourage private litigants, are wholly lacking in the case at bar.

Likewise, the overriding concern of Congress in enacting §1988 was to encourage individuals, particularly members of racial minorities, to seek relief from invidious discrimination based on race, sex, religion, wealth, and other inherently offensive criteria, See the examples of cases given by Senator Kennedy, 122 Cong. Rec. S1705, (daily ed. Sept. 29, 1976) (remarks of Sen. Kennedy), and by Representative Fish, 122 Cong. Rec. H12163, (daily ed. Oct. 1, 1976) (remarks of Rep. Fish), during debate on §1988. In each of the examples, the discrimination was discoverable (to say the least) and could have been unilaterally remedied by the discriminator. Not so in the case at bar.

A state statute which "discriminated" between those who had been qualified voters for three years and those who had not, for the purpose of providing minimal candidate qualifications, does not fit in the list of examples considered by the Congress in the debate on §1988. There is no invidious discrimination based on inherently offensive criteria. Inherent problems of enforcement are not present. No fundamental or national importance is involved. The case at bar was not even a class action. Its result was of extremely limited effect and narrow scope. It does not further or fit the Congressional purpose. It would be unjust to expand §1988 to such cases.

Good Faith

The actions of the school district in this case were in complete and unchallenged good faith. We recognize, as did the district court, that no bad faith standard is required by §1988. We comment on it, as did the trial judge, for "clarity and perspective." (Appendix B, p. 28) Furthermore, the absence of bad faith negatives any ground for the recovery of attorney's fees other than §1988. We also suggest that in considering whether there are special circumstances that would render an award of attorney's fees unjust in a given case the courts should not be guilty of tunnel vision. No case is made up of just one fact or circumstance. Surely, good faith should count for something in the cummulative consideration of all the circumstances bearing on the justice or injustice of a fee award.

> "To hold otherwise would compel a mechanistic application of fee awards which would preclude entirely the exercise of discretion by the district court." *Tillman v. Wheaton-Haven Recreation Ass'n, Inc.*, 517 F.2d 1141, 1152 (4th Cir. 1975), (dissenting opinion of senior Circuit Judge Boreman)

Considering *all* the circumstances of this case, we submit that the district court was correct in finding that an award of attorney's fees would be unjust.

IV.

This Court should not exercise its supervisory power over the lower courts on an issue committed to district court discretion.

Petitioner urges this Court to exercise its supervisory power over the lower courts merely because the Court *en banc* reached an even division. We submit that to do so on an issue committed to district court discretion would be to cast this Court in the role of a super legislature. It would be to render an advisory opinion. This Court should not attempt to determine what circumstances would or would not render the award of a fee in a given case unjust. but should leave such determination to the district courts, on a case by case basis, subject to the familiar standard of review for abuse of discretion. Such circumstances as the trial court's delay in carrying out the procedural formality of entering final judgment, resulting in the technical pendency of this case when §1988 was enacted nine months after the issues were decided, are exteremely unlikely to occur again. Future cases will have their own uniqueness. Formulation of mechanistic special circumstance rules by this Court could not be broad enough to alleviate the task of the lower courts, the task assigned by Congress, to determine those cases where an award of attorney's fees would be unjust.

CONCLUSION

Wherefore, for the foregoing reasons, respondent respectfully prays that the Writ be denied.

Respectfully submitted

DAVID B. OWEN
CECIL A. MORGAN
2108 Continental Life Bldg.
Fort Worth, Texas 76102
Attorneys for Respondent

March 12, 1979